No. 20591

United States
COURT OF APPEALS
for the Ninth Circuit

REDERI A/B SOYA, as owners of the Swedish Motor Vessel OTELLO,

Appellant,

v.

The SS. GRAND GRACE, her Engines, etc., and her Owners, GRACE NAVIGATION CORPORATION,

and

The MV JANE STOVE, her Engines, etc., and her Owners, LORENTZENS SKIBS A/B,

Appellees.

BRIEF OF "GRAND GRACE" APPELLEE GRACE NAVIGATION CORPORATION

Upon Appeal from the United States District Court, for the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-66

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STATEMENT OF FACTS

Appellant's so-called "Statement of Facts" is inaccurate, misleading, and ignores facts which resulted in the trial court finding OTELLO solely at fault for the collision.

Appellant tries to create the impression that OTELLO was "boxed in," and restricted in her navigation, by the closeness of the other vessels. Appellant states (Br. p. 2) that the ANTINOUS was anchored only 500 feet from OTELLO, and south of the main ship channel, and shows ANTINOUS in this position on the chart opposite page 2.

But Captain Pullen and Chief Mate Boese of the ANTINOUS located their vessel, based upon accurate bearings, in the middle of the main ship channel, right on the center line of the Astoria Range, (R. 1629, 1632, 1654, 1657, 1660, 1667) and at no time any closer than 2/10 of a nautical mile (1200 feet) from the OTELLO (R. 1613, 1640, 1670).[1]

Likewise appellant states (Br. p. 2) that GRAND GRACE was anchored ¼ to ½ mile astern of OTELLO. The accurate anchor bearings taken on GRAND GRACE show her position was 0.6 miles upriver (easterly) from OTELLO (Ex. 110, R. 1302-09). And appellant has placed GRAND GRACE, on the chart opposite Br. p. 2, at least 1200 yards, or 3600 feet (0.6 miles), distant from OTELLO.

In an effort to excuse OTELLO's dragging her anchor and her clumsy navigation, appellant greatly exaggerates the wind conditions. Admitting that winds of 35-50 knots had been predicted, appellant states (Br. p. 2) that the wind reached force 10-12 on the Beaufort

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[1] OTELLO's master admits ANTINOUS was anchored 1200 feet distant from his vessel (R. 239). Pilot Quinn located ANTINOUS slightly north of the Astoria Range Line. (Exs. 22A, 22B)

Scale (65 knots). This was a self-serving *estimate* recorded in OTELLO's log. The actual measured wind velocity, from official records (Exs. 42, 118) of the United States Weather Bureau Station at the nearby Astoria Airport (more exposed to the wind than the partly sheltered anchorage area) was as follows:

Time	*Direction*	*Speed (in Knots)*	
1158	220	20	G40
1256	230	22	G35
1357	220	28	G45
1458	270	30	G55
1556	260	35	G50

Thus, from noon until 4 P.M. the winds were only 20 to 35 miles per hour, with occasional gusts up to 35 to 55 miles per hour. Neither OTELLO nor JANE STOVE made any defense of vis major in the pretrial order, or at any time before the trial court.[2]

Appellant states (Br. p. 3) that OTELLO's master noticed she was dragging anchor at 2:30 P.M., and "shortly thereafter" put her engines on "standby." Actually, the engines were not put on standby until 12 minutes later, at 2:42 P.M., and were not used until 24 minutes later, at 2:54 P.M. (Ex. 10B, R. 210-11), and OTELLO's master did not send anyone forward to her bow, to tend her anchors until about 3 P.M., a delay of 25 to 30 minutes after it was known she was dragging anchor (R. 414, 584-85).

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[2] The parties agreed in the pretrial order and the court found that there was a "strong westerly wind." (Agreed Facts 11, R. 51; Finding 11, R. 77)

Also, appellant states (Br. p. 3) after OTELLO heaved in about two shackles of chain (180 feet), the chain caught across her bow, "thus preventing the crew from heaving in any more chain." This happens often and is easily remedied (R. 460). And shortly afterwards OTELLO's bow swung to starboard and the chain was free (R. 205). Yet her master never made any attempt either to take in the anchor, or to let out more chain, but instead attempted to navigate encumbered by his chain and anchor and three shots of chain (R. 206-07).

Appellant states that "efforts to head OTELLO into the wind by use of her engines and helm were futile" (Br. p. 3). The fact is that OTELLO, although a twin screw vessel and thus highly maneuverable by use of her engines, never ran her starboard engine at full ahead until 1520, when collision was imminent (Ex. 10B).

The trial judge, having heard the master of OTELLO testify in person, found that OTELLO was negligent in numerous particulars, and that her faults "were major in character, were the proximate cause of and fully account for the collision " (R. 74, 80).

OTELLO's brief states that the GRAND GRACE "had observed the predicament of the OTELLO from the beginning (nearly an hour before), but made no effort whatsoever to avoid the collision." (Br., p. 4). This ignores the fact that both the master of OTELLO, and the officers aboard GRAND GRACE, testified that OTELLO was navigating out towards the channel and there was no reason for GRAND GRACE, lying properly at anchor out of the channel, to apprehend danger of

OTELLO colliding with her until a few moments before the collision, and then there was no time for GRAND GRACE to do anything to avoid collision (See infra, pp. 31-34). The master of every vessel on the scene testified there was nothing GRAND GRACE could have done to avoid the collision (See infra, pp. 29-31). The trial court found that GRAND GRACE was "not negligent or at fault in any of the respects charged by libelant, or otherwise" (Finding 18, R. 79). The court also found the collision "was not proximately caused by failure of the SS GRAND GRACE to let out anchor chain or to use its engines and rudder in the manner that libelant contends GRAND GRACE should have done" (Finding 19, R. 79).

We add a few additional facts:

GRAND GRACE was a Liberty-type ship. She was at anchor in the position marked on the chart opposite p. 2 of appellant's brief. She was in a designated anchorage area, well out of the ship channel, and had been there for two days (Agreed Fact 9, R. 51).

There was broad daylight and good visibility at all times involved.

OTELLO was a twin-screw vessel with 6,400 horsepower diesel engines (R. 51). At all times she had full use of her engines and rudder (R. 248). Having commenced to drag at 2:30 P. M., she commenced to heave in her anchor a little after 3:00 P. M. After swinging to a northerly heading, OTELLO attempted to pass by the ANTINOUS and proceed to the main channel or fairway (R. 388).

ARGUMENT

Summary of Argument

This appeal involves only questions of fact. The trial court found the OTELLO negligent in numerous particulars, and that her faults "were flagrant and major in character and were the proximate cause of and fully account for the collision" (R. 74, 80).

The court found that GRAND GRACE was not negligent, and that the collision was not proximately caused by any failure of GRAND GRACE to take avoiding action as contended by OTELLO (R. 79).

These findings of fact should not be set aside unless "clearly erroneous." *McAllister* v. *United States,* 348 U.S. 19 (1954). The findings are supported by abundant evidence, and also by the presumption that when a moving vessel strikes a vessel at anchor, the moving vessel is presumed at fault, and the anchored vessel is presumed to be innocent.

The trial court found libelant's contentions and supporting arguments resourceful, "but the evidence on which they are based is shadowy, illusory and in most instances non-existent." (Mem. Dec., R. 74; Finding 21, R. 79). This appeal, having been taken solely on questions of fact, and in the face of the rule of *McAllister* v. *United States,* appears to have been sued out primarily for delay, and appellee Grace Navigation Corporation requests damages for delay pursuant to Rule 24 of this Court.

I

The Trial Court's Findings May Not be Set Aside Unless Clearly Erroneous

By the well-known rule of *McAllister* v. *United States,* 348 U.S. 19 (1954) the trial court's findings of fact are binding and may not be set aside unless "clearly erroneous."

In *Albina Eng. & Mach. Wks.* v. *Amer. Mail Line, Ltd.,* 263 F.2d 311 (C.A. 9, 1959), this Court said:

> "The finding (that American Mail Line was not negligent) was not clearly erroneous. And by McAllister v. United States, the idea was laid to rest that this court can try admiralty fact questions anew." 263 F.2d 311, 314.

Faced with the "clearly erroneous" rule, appellant takes the desperate course of attempting to discredit the findings by wholly unwarranted charges that "impugn the integrity of the District Court." *Atwood* v. *Humble Oil & Refining Co.,* 338 F.2d 502, 512.

1. Charge of "Parroting."

Appellant charges that the trial court "parroted" or "rubber-stamped" the findings prepared by prevailing counsel (Br., pp. 6-8). The fact is that two months after the trial was concluded (R. 323) and after appellant's counsel had filed three briefs totalling 125 pages, the trial court rendered the following Memorandum Decision:

> "I have no difficulty in deciding either the law or the facts in this case. Obviously, libelant, fully recognizing its own fault, is attempting to saddle

at least a portion of the blame on either respondent SS GRAND GRACE or MV JANE STOVE, or both. Libelant's contentions, and the arguments in support thereof, are quite resourceful but the evidence on which they are based is shadowy, illusory, and in most instances non-existent. Libelant has completely failed to carry its burden of proof. Its evidence does not rise to the dignity of casting a burden of proof on either of the respondents.

"On the other hand, I find that respondent SS GRAND GRACE has proved her charges of negligence against the libelant as charged in paragraph 2 and in paragraph 3 (a), (b), (c), (d), (e), (h), (i), (k), (l), (m) and (n).[3] The evidence establishes beyond question that the faults and the negligence of the libelant were major in character, were the proximate cause of and fully account for the collision. Any doubts as to the conduct of the respondents, or either of them, must be resolved in their favor.

"The charges of negligence by respondent SS GRAND GRACE against the respondent MV JANE STOVE are not sustained by the evidence.

"As a result of the collision, the SS GRAND GRACE sustained extensive damage to her hull and possibly other damages which were the proximate cause of the faults and negligence of the libelant as aforesaid.

"Proctors for SS GRAND GRACE and MV JANE STOVE shall draft, serve and present findings and interlocutory decree in conformity herewith." (R. 73-74)

It should be noted that the trial court thus inde-

[3] References are to Pre-Trial Order, R. 54.

pendently found that OTELLO was negligent in various particulars, that these faults were major in character, and were the proximate cause of and fully accounted for the collision, and that OTELLO's charges against GRAND GRACE were not proved. It should also be noted that the trial court was discriminating in its findings of negligence and rejected certain specifications of negligence as charged against OTELLO in paragraph 3(f), (g) and (j) of the pretrial order (R. 54).

After findings prepared by proctors for the prevailing parties were submitted, the court addressed a letter to all counsel, stating:

> "The findings and interlocutory decree presented by Mr. Wood are, in my view, in conformity with my recent memorandum. Both the findings and the decree have been signed as of today. . . ." (Appendix 1)

2. Counsel-Prepared Findings are Findings of the Court.

It is customary for trial courts to call on prevailing counsel for assistance in preparing findings of fact. Such findings, when adopted, have the full force and dignity of findings by the court, and are entitled to the same weight.

Molitor v. *American President Lines,* 343 F.2d 217 (C.A. 9, 1965).

Mississippi Valley Barge Line Co. v. *Cooper Terminal Co.,* 217 F.2d 321 (C.A. 7, 1954).

Atwood v. *Humble Oil & Refining Co.,* 338 F.2d 502 (C.A. 5, 1964).

In the recent *Molitor* case before Judges Madden, Hamley and Koelsch, this Court said:

> "It is immaterial that counsel for the prevailing party, at the request of the court, prepared the findings.
>
> "The only question concerning the facts of this case which this court may appropriately consider is whether any of the essential findings of fact are clearly erroneous. McAllister v. United States, 348 U.S. 19." 343 F.2d 217, 219.

Appellant's brief (pp. 8-9) quotes from *The Severance,* 152 F.2d 916 (C.A. 4, 1945). *The Severance* is fully discussed in the much more recent decision in *Mississippi Valley Barge Line Co.* v. *Cooper Terminal Co., supra,* in which the court states it is perfectly proper for the "busy trial judge" to request counsel for the winning party to prepare findings and conclusions, and that such findings, when adopted, come within the rule of *McAllister* v. *United States,* and cannot be set aside unless clearly erroneous. "Findings of fact submitted by counsel and adopted by the court pursuant to Rule 52(a) are entitled to the same respect as if the court itself had drafted them." 217 F.2d 321, 322-23.

3. Appellant's Opportunity to Submit Supplemental Findings.

Appellant complains that the trial court signed the findings "without affording appellant the prior opportunity to review them or to submit counter proposals." (Appellant's Spec. Er. 8, Br. 6). This is spurious.

The trial judge promptly notified all parties when the findings were signed (App. I). Under FRCP Rule 52(b), and the practice of the trial court,[4] appellant had the right, within 10 days after entry of the decree, to move for amendment of the findings or adoption of additional findings. Appellant simply failed to avail itself of this privilege and is "now in no position to complain of the court's findings simply because they are in accord with those suggested by the other party." *Atwood* v. *Humble Oil & Ref. Co., supra,* at 512.

Appellant's whole attack on the findings reveals the desperate weakness of their position; for it is nothing more than an effort to impugn the integrity of the court. A very similar attack was rebuffed in *Atwood* v. *Humble Oil & Ref. Co.,* 338 F.2d 502 (C.A. 5, 1965):

> "Their whole argument rests on the unfounded assumption that the district judge failed to perform his duty of making findings and conclusions to support the judgment. By assuming that the findings do not represent the real determination and conclusions of the court, but were merely spoon-fed to the court, the plaintiffs impugn the integrity of the district court and make an unwarranted assumption that finds no support in the record." 338 F.2d 502, 512.

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[4] Admiralty Rule 50 of the District Court makes Federal Rules of Civil Procedure applicable to such procedural matters.

II

Findings of Negligence and Proximate Cause are Findings of Fact

Appellant's Point III contends that the trial court's findings of negligence are not findings of fact, but mere conclusions reviewable on appeal.

It is well settled in this Circuit that the trial court's findings of negligence, proximate cause, unseaworthiness, or the absence thereof, are *findings of fact,* which cannot be set aside unless clearly erroneous.

In *Molitor* v. *American President Lines, Ltd.,* 343 F.2d 217 (C.A. 9, 1965), the trial court had found that defendant was not negligent, that the vessel was not unseaworthy, and that no negligence or unseaworthines was the proximate cause of injury to plaintiff. Upon appeal, this Court said, "Contrary to Molitor's assertion, the trial court made complete findings of fact. . . . The only question concerning the facts of this case which this court may appropriately consider is whether any of the essential findings of fact are clearly erroneous." 343 F.2d at 219.

In *Albina Eng. & Mach. Wks., Inc.* v. *Amer. Mail Line, Ltd.,* 263 F.2d 311 (C.A. 9, 1959), the trial court affirmatively found that American Mail had not been negligent in any way. On appeal this Court said:

> "Appellant presents a strong argument that American was negligent at the time the boat was lowered and the injury occurred, but we are satisfied that the trial court did not have to find, as a matter of law, that American Mail was negligent.

> It could have so found, but did not. The finding was not clearly erroneous. And by McAllister v. United States . . . the idea was laid to rest that this court can try admiralty fact questions anew." 263 F.2d at 314.

In *U. S.* v. *Harrison,* 245 F.2d 911 (C.A. 1957), in which a ship sought indemnity from an unloading stevedore, this Court said:

> "Here there are express findings by the trial court that the Stevedore was not at fault or negligent in any manner, and the accident was the sole fault of the agents of the government.
>
> . . . . .
>
> "The findings are not clearly erroneous." 245 F2d. at 914.

In *States S.S. Co.* v. *U. S. et al* (The Pennsylvania), 259 F.2d 458 (C.A. 9, 1957), the trial court made a finding that "petitioner did not use the due diligence required by law to make the vessel seaworthy." This Court, in the decision on rehearing, said, "For the reasons set forth in McAllister v. United States, we cannot go beyond that finding." 259 F.2d at 466.

U. S. v. *The Agioi Victores,* 227 F.2d 571 (C.A. 9, 1955) was a collision case. The trial court had found "there was no negligence on the part of the Agioi Victores," and that there was negligence on the part of the dredge in not keeping a proper lookout and in not giving timely fog signals. As to these findings, this Court said:

> "In reviewing this judgment of a trial court, sitting without a jury in admiralty, we may not set aside the judgment below unless it is clearly erroneous. McAllister v. United States . . ." 227 F.2d at 574.

III

The Findings are Supported by Substantial Evidence

A. The Presumption against the Moving Vessel and in Favor of Anchored Vessel.

The OTELLO, with full use of her engines and rudder, was a moving vessel attempting to navigate out into the fairway. The GRAND GRACE was properly anchored and had been in the same position for two days.

Where a moving vessel collides with an anchored vessel, there is a strong presumption of fault on the part of the moving vessel, and of innocence on the part of the anchored vessel. *The Oregon,* 158 U.S. 186 (1895); *The Louisiana,* 70 U.S. (3 Wall.) 164, 18 L. ed. 85 (1866); *The Blue Goddess,* 199 F.2d 460 (C.A. 7, 1952); *The Europe,* 175 Fed. 596 (D.C. Or. 1909); *Fassio* v. *The E. W. Sinclair,* 207 F. Supp. 700 (S.D. N.Y. 1962).

The Supreme Court said, in *The Oregon*:

> "Where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. The principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter." 158 U.S. at 197.

In *The Louisiana, supra,* a vessel which drifted from

her moorings in a high wind was held solely at fault for collision with another vessel. The Supreme Court said:

> "The collision being caused by the Louisiana drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a *vis major,* which human skill and precaution and a proper display of nautical skill could not have prevented." 70 U.S. at 173.

In a more recent case, *The Blue Goddess, supra,* the Seventh Circuit said:

> "It is an established rule in admiralty that when a vessel at anchor is struck by a moving vessel, it is the burden of the moving vessel to exonerate herself from blame." 199 F.2d at 462.

The Europe involved a collision in the Willamette River between a navigating vessel and one at anchor. The Oregon District Court said:

> "It is a rule that a moving vessel must keep out of the way of one at anchor. This because the one at anchor is practically helpless, and is usually so conditioned as to be unable to relieve herself readily in stress of emergency. The rule is applied with great strictness, the vessel at anchor being in a proper place. In such case the presumption of fault lies against the vessel in motion." 175 Fed. at 607.

The trial court, having seen and heard Captain Sundlof testify in explanation of his navigation of the OTELLO, expressly found:

> "15. The Court finds that said collision of the MS OTELLO with the SS GRAND GRACE, and the resulting damage to the vessels, was proximately

caused solely by fault and negligence of the MS OTELLO and those in charge of her navigation, in that she was maneuvering and was a moving vessel and in broad daylight collided with the GRAND GRACE, which was lying properly at anchor in a designated anchorage ground. The OTELLO was presumptively at fault and has wholly failed to overcome the presumption of fault." Finding of Fact 15, R. 78.

This finding is fully supported by the evidence that OTELLO was a moving vessel, had full use of her engines and rudder, was actually navigating, it was broad daylight, the GRAND GRACE was lying properly at anchor, and that OTELLO completely failed to show any *vis major* or inevitable accident to overcome the presumption. See *The Louisiana, supra.*

B. Specific Findings of Otello's Negligence

The trial court also specifically found OTELLO negligent in eleven particulars (Finding 16, R. 78-79). In accordance with Rule 18(3) we shall set forth some of the abundant evidence in support of each specification. To avoid repetition, it should be noted that evidence set forth under one specification may also support others.

FINDING 16(a)

"In allowing OTELLO to drag her anchor, and in failing to let out more anchor chain, and in failing to use her second anchor, so as to prevent dragging, and to avoid collision." (R. 78)

It is elemental that paying out more chain, or drop-

ping a second anchor, are the appropriate precautions to be taken by a vessel dragging her anchor. *Ciudad de Reus* 185 Fed. 391, 395 (C.A. 2, 1911); *The Sapphire,* 11 Wall. 164, 170; *The Anerly,* 58 Fed. 794 (1893). OTELLO's master admitted that the more chain let out, the better the anchor holds (R. 202). He failed to ever let out chain or use his second anchor (R. 220).

OTELLO's master was aware that this vessel was dragging at 2:30 P. M. (R. 166, 199-200). Yet no one was sent to OTELLO's bow to tend the anchors until about 3 P. M.[5] After three or four more minutes (now past 3:00 P. M.), the Captain ordered the anchor heaved in (R. 587). But the Mate did not carry out the order at that time because there was no man in the chain locker (R. 528). So Third Mate Von Endt, the watch officer whose duty was on the bridge assisting the master in navigation, was sent to find someone to go to the chain locker, and when he could find no one he went there himself (R. 218-19, 528-29, 543).

After OTELLO was all clear of the lumber barge MARY OLSEN, she still had half a mile of clear water before reaching the GRAND GRACE (R. 216-17). The charts, and photographic exhibit 40E, show that OTELLO had plenty of sea room. She had lots of time and opportunity to let out chain or drop her second anchor, but did neither.

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[5] Lindstrom, the Chief Mate, was called to the foc'sle to tend the anchor at "two or three minutes to three" (R. 414). Wyman, OTELLO's carpenter who operated the anchor windlass, was not called until 2:55, and reached the bow two or three minutes before 3:00. He recorded the time to collect his overtime pay (R. 584-85).

Strong evidence came from Captain Pullen and Chief Mate Boese, of the ANTINOUS, both impartial witnesses with a grandstand view.

Captain Pullen, an experienced master, testified OTELLO could and should have used her second anchor (R. 1620-27). Chief Mate Boese, also a licensed master, testified that dropping the second anchor is usually done when you are anchored and have high winds. As he stood on the bridge of the ANTINOUS, watching OTELLO's maneuvers, he said to his shipmates: "What is the matter with this ship, why don't they drop the other anchor?" (R. 1720).

The ANTINOUS herself put out a second anchor to hold her position under the circumstances existing at the time (R. 1641-42, 1729).

Numerous court decisions have condemned a dragging vessel for not dropping its second anchor. In *The Anerly,* 58 Fed. 794 (1893), a case relied upon by appellant, the court said:

> "Where there are known indications of the danger of drifting from any extraordinary causes, whether from ice, storm, or position, ordinary prudence requires that *both* anchors be let go; and the omission of this precaution is held to be at the vessel's risk. The Sapphire, 11 Wall. 164, 170; The Energy, 10 Ben. 158; The John Tucker, 5 Ben. 366; The Eloina, 10 Ben. 458; The Lilian M. Vigus, 22 Fed. 747; The Mary Fraser, 26 Fed. 872." 58 Fed. at 795.

FINDING 16(b)

> "In failing to use her engines and twin screws to ease the strain on her anchor and so prevent dragging." (R. 78)

Although the master of OTELLO knew his vessel was dragging, and went to the bridge at 2:30 P. M., he did not even order the engines on standby until 2:42 P. M., and made no use of his engines at all until 2:54 P. M. (OTELLO's engine bell book, Ex. 10B; log translation, Ex. 38; testimony of Sundlof, R. 210-11).

It is fundamental that when a vessel is dragging, the engines can be used to take the strain off the anchor (R. 204). The ANTINOUS, caught by the same wind in the same anchorage area, used his engines to hold position (R. 1642).

FINDING 16(c)

> "In failing to keep OTELLO under control, and in allowing OTELLO to collide with a properly anchored vessel." (R. 78)

As to this, the facts speak for themselves.

Although OTELLO had full use of her engines and twin screws and rudder (R. 220), she was not being navigated under control.

Captain Pullen of the ANTINOUS testified OTELLO "looked like to me she was just paralyzed . . ." (R. 1620); and also, "there she is drifting down like a piece of log" and doing nothing about it (R. 1695). This finding is also fully supported by the evidence set forth under other headings.

FINDINGS 16(d), (e)

"(d) In attempting to navigate OTELLO with one anchor and chain dragging on the bottom."

"(e) In failing to take in her anchor and chain before attempting to navigate and maneuver." (R. 78)

After the delays set forth above, and after 3:00 P. M., OTELLO finally commenced to heave in her anchor. After taking in two shots (180 feet) the anchor chain led across the bow (R. 204-05). Although this happens often (R. 460), OTELLO's windlass was unable to continue heaving in (R. 205, 580).

But this was only a temporary condition. Soon afterwards OTELLO's bow swung to starboard, so that the vessel was headed northerly. The anchor chain was then free, and there was no reason OTELLO could not have taken it in (R. 178, 205-07, 594).

OTELLO's master decided to attempt to navigate out to the fairway (R. 178, 184). But he failed to finish taking in the anchor, and tried to navigate encumbered by the anchor and three shots (270 feet) of chain dragging on the bottom (R. 594).

As already shown, OTELLO had plenty of room in which to navigate, and the court so found. She could have let out more chain and a second anchor to hold her position, or she could have taken in her anchor and navigated freely. Instead, she attempted to navigate encumbered with her anchor dragging on a short chain.

FINDINGS 16(f), (g), (i)

"(f) In failing to use her twin screws to assist in steering so as to avoid collision."

"(g) In failing to navigate out into the fairway at a time when she had ample room and time to do so."

"(i) In failing to use her engines so as to maneuver away from the GRAND GRACE to avoid collision." (R. 79).

These findings are supported by much of the evidence already set forth.

OTELLO was a twin-screw motor ship of 6,400 hp (R. 207). Her twin screws, one on each side of the propeller, gave her strong turning power, and more easily maneuverable than a single-screw vessel (R. 208). She could turn left by going full ahead on her starboard engine while at the same time going astern on the port engine, and vice versa (R. 208, 1719).

After OTELLO had cleared the barge MARY OLSEN, she had a large amount of river in which to maneuver (see charts and Ex. 40E). OTELLO's master admits it was still one-half mile from that point to the GRAND GRACE (R. 216). ANTINOUS was way out in the center of the channel (see supra, p. 2).

OTELLO had full use of her twin screws and her rudder (R. 220). She had room to turn and head into the wind and proceed downstream. She had room to proceed out to the channel astern of ANTINOUS. Or she had room to pass upriver between GRAND GRACE

and the shore, along the same route that JANE STOVE had taken earlier (R. 305-07).

The evidence establishes that OTELLO made no effective use of her engines and rudder. Following is the record of her engine movements, based on her bell book (Ex. 10B) and cross-examination of her master (R. 210-15).

OTELLO ENGINE ORDERS

Time	*Port Engine*	*Starboard Engine*
14:30 (2:30 p.m.) commenced dragging		
14:42	Standby	Standby
14:54		Dead slow ahead
14:56		Stop
15:00 (3:00 p.m.)	Dead slow ahead	
15:02	Stop	
15:03	Dead slow ahead	Slow ahead; half ahead
15:04	Stop	
15:05		Dead slow ahead
15:07		Stop
15:08	Dead slow ahead; Slow ahead	
15:10	Half ahead; full ahead	
15:11	Half ahead; slow ahead	
15:12		Dead slow ahead
15:13	Dead slow ahead	
15:14	Stop	

Time	*Port Engine*	*Starboard Engine*
15:15		Slow ahead; half ahead
15:17	Dead slow astern	Stop; dead slow astern
15:18		Stop; slow; stop
15:19	Stop	Slow ahead; stop
15:20	Full ahead	Half ahead; full ahead
15:21	Stop	Slow ahead; stop
15:22 (3:22) Collision	slow ahead; half ahead	

This establishes that OTELLO never once used her engines in opposition, at even slow or half speeds. At no time was the port engine ever put astern while the starboard engine was ahead (R.. 210, 215). In fact, the port engine was never run astern at all until at 1517, a few minutes before collision, it was run dead slow astern. And the starboard engine was never run full ahead until 1520 when the collision was imminent.

Captain Pullen of the ANTINOUS testified the appropriate maneuver would have been hard left rudder and full ahead to come up into the wind (R. 1620-22). Chief Mate Boese of the ANTINOUS testified that under the existing conditions, between the time OTELLO started to drift and the time she passed the ANTINOUS:

> "A. . . . there was no reason why she couldn't have got back into the channel and found another anchorage. No reason whatsoever." (R. 1717)

Then when OTELLO cleared the ANTINOUS, if her way to the ship channel was blocked by the JANE

STOVE, she had ample opportunity to go full astern, and pass between GRAND GRACE and the shore (where JANE STOVE had previously passed) (R. 305-07). But instead, as JANE STOVE was approaching, OTELLO hesitated with dead slows and stops. Captain Quinn, the experienced pilot in charge of the JANE STOVE, who testified in person at the trial, said that after he passed OTELLO, the OTELLO had "ample room to pass clear of the GRAND GRACE" (R. 294, 310).

Finally, at 3:20., OTELLO did go full ahead on its engines. But OTELLO stopped both engines at 3:21. It was still one minute before collision. Had OTELLO continued at full ahead for that precious minute, she would have cleared GRAND GRACE. For even at a speed of five miles per hour, she would travel 500 feet in one minute, and the point of collision was 200 feet from her stern (R. 186-87).

OTELLO's bell book, and her master's testimony, show that she failed to take any positive, decisive action with her engines to avoid collision. Perhaps this was because the watch officer, whose duty was on the bridge assisting the master and handling the engine telegraphs, was down in the chain locker (R. 218-19, 528-29), and the master alone was blowing whistles, giving anchor orders, giving steering orders, attempting a lookout, and trying to navigate, as well as handling the telegraphs in the wheelhouse (R. 219, 640-41, 648-49).

FINDING 16(h)

"In failing to keep a proper lookout."

OTELLO's situation, dragging in an anchorage with other vessels in the area, clearly called for a most careful lookout. A lookout is required while navigating in a harbor or anchorage (R. 217-18). *The Knoxville City,* 112 F.2d 223 (C.A. 9, 1940).

But no one on the OTELLO was charged with responsibility of keeping a lookout. The only persons on the bow were the chief mate and carpenter, whose duties were to tend the anchors. They made no report to the master that he was getting dangerously close to the GRAND GRACE (R. 392-93). The watch officer, instead of being on the bridge, was down in the chain locker (R. 218-19, 528-29). The only persons on the bridge of OTELLO were the master, helmsman, and the wireless operator, who had no duty as a lookout, but was there merely as a matter of interest (R. 649). The master was attempting to do everything himself (R. 219). Radio Officer Wilen testified:

"Q. I understand you came on the bridge about 3:00 o'clock, or a little bit before 3:00 o'clock.

A. Before 3:00 o'clock, yes.

Q. And you remained on the bridge to the time of collision?

A. Yes.

Q. And the captain was giving the steering orders?

A. Yes.

Q. And the captain was blowing the whistle?

A. Yes.

Q. And the captain was giving anchor orders?

A. Yes.

Q. And the captain was handling the engine telegraph?

A. Yes.

Q. And the captain was watching for the Waterman's ship?

A. Yes.

Q. And the captain was watching for the JANE STOVE?

A. Yes.

Q. And then you told the captain he was getting close to the GRAND GRACE?

A. Yes."

* * * * *

"Q. Were you assisting the captain in the navigation?

A. No, nothing that way.

Q. The captain had no other officer there to assist in the navigation, did he?

A. No. The chief mate, he was standing on the forecastle.

Q. Yes. It isn't your duty as radio officer to assist in the navigation, is it?

A. No, it isn't." (R. 640-41).

OTELLO'S captain was preoccupied with the ANTINOUS and the JANE STOVE, and did not realize he was getting dangerously close to GRAND GRACE until he was warned by the radio officer (R. 392-93).

The evidence clearly establishes that OTELLO did not have such a "free and single-minded lookout," (charged with the duty of lookout and with no other responsibility) as required by decisions of this Circuit. *The Koyei Maru,* 96 F.2d 652 (C.A. 9, 1938); the *Knoxville City,* 112 F.2d 223 (C.A. 9, 1940).

OTELLO's failure to maintain a proper lookout was a statutory fault. 33 U.S.C. § 221. This brings into operation the rule of *The Pennsylvania,* 86 U.S. 125 (1874), imposing on OTELLO the heavy burden of proving that the violation not only *did not* cause the collision, but that it *could not* have caused the collision, — a burden that OTELLO cannot sustain. Gilmore & Black, Law of Admiralty, 404 et seq.

> "The duty of the lookout is of the highest importance. . . . Every doubt as to the performance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary." The Ariadne, 13 Wall. 475, 478-79; 20 L. ed. 542.

FINDINGS 16(j), (k)

> "(j) She was not in charge of competent persons."
>
> "(h) Although she had 50 minutes in which to maneuver, and it was broad daylight, and there was ample sea room, she failed to take any effective action to avoid colliding with an anchored vessel." R. 79).

These findings were made by the trial judge after hearing OTELLO's master testify in open court with full opportunity to explain his maneuvers. They are supported fully by the evidence already set forth. We can pity the master of the OTELLO, ineffectively blowing whistles for a pilot for 45 minutes (R. 200), although his radio officer could have called the pilot station in two minutes (R. 644); no one at the anchors for half an hour; his watch officer down below in the chain locker;

trying to handle everything himself on the bridge. But OTELLO cannot be excused from its failure to take any effective action to avoid the collision.

C. Grand Grace Not at Fault.

The trial court found:

> "18. . . . that the SS GRAND GRACE, and those in charge of her navigation, were not negligent or at fault in any of the respects charged by the libelant, or otherwise" (R. 79).
>
> "19. The collision was not proximately caused by failure of the SS GRAND GRACE to let out anchor chain or to use its engines and rudder in the manner that libelant contends GRAND GRACE should have done" (R. 79).

These findings are supported by the fact that GRAND GRACE was lying properly at anchor, and the strong presumption of innocence on the part of the anchored vessel. *The Oregon,* 158 U.S. 186 (1895); *The Europe,* 175 Fed. 596 (D.C. Or. 1909); *Villain & Fassio* v. *The E. W. Sinclair,* 207 F. Supp. 700 (S.D. N.Y. 1962).

In *The Europe,* the court said the reason for the presumption is that the vessel "at anchor is practically helpless, and is usually so conditioned as to be unable to relieve itself suddenly in stress of emergency. The rule is applied with great strictness, the vessel at anchor being in a proper place." 175 Fed. at 607.

In *Villain & Fassio* v. *The E .W. Sinclair,* the Court said: "A vessel properly at anchor, as was the Fassio, is

entitled to the highest degree of privilege. In a collision between a moving vessel and an anchored vessel, the anchored vessel is presumed to be innocent." 207 F. Supp. at 706.

The Court's findings are supported by evidence of the strongest kind. The master of every other vessel involved, including the OTELLO, has testified that under the existing conditions there was no action GRAND GRACE could have taken to avoid the collision.

Captain Pullen, of the ANTINOUS, an experienced, impartial witness with a grandstand view, testified:

> "Q. Now, from your point of observation was there anything the Liberty ship GRAND GRACE could do?
>
> A. Well, I couldn't see what, anything the GRAND GRACE, what the GRAND GRACE could have done." (R. 1647-48).

Chief Mate Boese, of the ANTINOUS, an experienced seaman with Master's license, was a disinterested witness who watched the whole occurrence. He testified:

> "Q. Well, you have had a lot of experience at sea, and you were right you might say at a grandstand position to view this thing. This is asking for an opinion, but what steps do you think could have been taken by any of the vessels to have avoided this collision; what ones do you feel should have taken steps and could have taken steps?
>
> A. When this Swedish ship, when they saw that they were dragging anchor, they should have dropped their port anchor or got steam up and got back into the channel and moved anchorage, or even

drug their anchor downstream. If they drug it one way it sure would drag the other way. Just like a ship docking, you drop your anchor to slow it up."

* * * * *

"Q. Do you think there was any fault on the part of the Liberty ship (GRAND GRACE)?

A. I do not." (R. 1722).

Captain Christoffersen, Master of the JANE STOVE, testified:

"Q. Now, as you were approaching the GRAND GRACE and the Swedish ship, on your port side, you came up abeam of them, and you saw that the GRAND GRACE was anchored, and you knew she was down?

A. Yes.

Q. And you saw the other ship drifting down upon her, did you not?

A. Yes, sir.

Q. And you knew the conditions of the wind and the weather?

A. Yes.

Q. You saw the whole thing?

A. Yes, right.

Q. Was there anything that the GRAND GRACE could have done that would have avoided this collision?

A. I don't think so" (R. 1407-08).

Finally, and this is what brands OTELLO's contentions as frivolous, even OTELLO's Master, Captain Sundlof, testified that he did not expect or think that GRAND GRACE could have done anything to avoid the collision:

"Q. What did you want the GRAND GRACE to do?

A. Nothing at all whatsoever; so far she couldn't do very much. Probably she could strike the anchor, but I don't know how much anchor she had out in the water, but probably had almost everything. She couldn't do—in this case I don't think she could do anything" (R. 360).

Appellant's brief tries to create the impression that GRAND GRACE was aware of danger of collision for nearly an hour, and did nothing about it. This is false, and contrary to the facts found by the court.

Although OTELLO commenced to drag at 2:30 P.M., she did nothing about it until after 3:00 P. M. Sometime after 3:00 P. M., and when still over half a mile from GRAND GRACE, with full use of her engines and rudder, OTELLO commenced to navigate to pass out to the fairway (R. 216). And that is just what GRAND GRACE thought she was doing (R. 1073-75; 1311-13, 834). It was only at the very last moment, when OTELLO was very close to GRAND GRACE, that there was any reason for GRAND GRACE to be alarmed, and then there was no time to do anything (R. 1076; 1313-14). This is established by the testimony of both the OTELLO and GRAND GRACE.

At the trial Captain Sundlof testified that he planned to pass clear of ANTINOUS' stern and proceed into the channel, and if it had not been for the JANE STOVE coming along he could have done this (R. 183-84). There was no danger of collision until the JANE STOVE proceeded to cross his bow (R. 231-32).

"Q. Then you had plenty of room to pass out between the ANTINOUS and the GRAND GRACE?

A. Yes.

Q. And you had the use of your engines and your rudder?

A. Yes.

Q. And you would have had no difficulty passing into the clear?

A. No.

Q. You say no, you mean . . .

A. We had no trouble, no problem.

Q. Or if the JANE STOVE had stopped and let you carry out your intended maneuver, you would have had no problem?

A. No.

Q. But it was when you became aware that the JANE STOVE didn't and she crossed your bow, then that put you in difficulties?

A. Yes." (R. 247-48).

And in his deposition, Captain Sundlof testified that he had plenty of room to pass between ANTINOUS and GRAND GRACE, and he did not become concerned about the GRAND GRACE until JANE STOVE forced him to stop and go astern, "and then before we could get speed and go up again then it was too late." He was then only about 75 meters from the GRAND GRACE (R. 391-92).

OTELLO's Chief Mate, Lindstrom, testified that the collision occurred in "about one minute" after JANE STOVE passed OTELLO's bow (R. 429). Her carpenter, Wyman, testified the collision took place "only a few seconds" after JANE STOVE passed (R. 592).

Second Mate Rundquist saw the JANE STOVE approaching about 150 feet off, and GRAND GRACE was about 200 feet distant, and "from there it was only a matter of seconds since I came out till the collision" (R. 479-80).

The foregoing coincides with GRAND GRACE's version that there was no reason to apprehend danger of collision until OTELLO was very close, and then there was no time to do anything.

Captain Wang, master of the GRAND GRACE,[6] testified the OTELLO appeared to be leaving her anchorage to proceed out to the ship channel (R. 1073-74). This was not unusual, — while the GRAND GRACE had been at anchor other vessels had passed her moving up and down the fairway (R. 1074). There was plenty of room for OTELLO to pass between GRAND GRACE and the ANTINOUS, and he was not aware that OTELLO would have any difficulty passing to the fairway (R. 1074-75). He was first aware of danger when OTELLO stopped its engines very close, at a distance of about 100-150 feet (R. 1075-76). He then testified:

> "Q. From the time that the OTELLO appeared to stop his engines and you saw there was danger of him hitting you, how long was it from then till he hit your ship?
>
> A. A couple of minutes, about.
>
> Q. Did you have time to take any action to avoid the collision?
>
> A. At no time.

[6] The master, Hao Wang, and the mate on watch, Wang Yu Teh, were on the bridge doing routine work checking compasses (R. 1071).

Q. Was there any action you could take to avoid the collision at that time?

A. There was hurry. The time is so hurry I have no time . . ." (R. 1076-77).

Third Mate Wang Yu Teh, the watch officer, testified that OTELLO was headed toward the fairway, and she was moving, and there was no danger to the GRAND GRACE until OTELLO was 100-150 feet distant when she stopped her engines (R. 1313-14). He testified that OTELLO was moving and was using its engines, and was proceeding to the fairway. Other ships had passed by closer than that. He felt no danger until OTELLO was 100-150 feet (R. 1353-54).

Likewise, Chief Mate Sha testified, "Actually, she is shifting anchorage, and if she is going to fairway she would have been all right, I should think. But afterwards she stopped on our bow, like this, in this position." From OTELLO's position 3, at which there was no danger, to OTELLO's position 4, (collision) on the diagram drawn by Chief Mate Sha, and attached as Appendix A to appellant's brief, was "only about two minutes, very quick . . ." and "we got no time to do anything" (R. 837-38, 842).

GRAND GRACE was not aware that OTELLO was dragging her anchor. This was only learned after the collision (R. 854). GRAND GRACE was headed westerly. OTELLO was headed northerly with her starboard side toward GRAND GRACE. It was OTELLO's port anchor that was out, and therefore GRAND GRACE could not see that the anchor chain was out on OTELLO's port side.

OTELLO's charges against GRAND GRACE are essentially two: (1) that GRAND GRACE should have slacked off chain; and (2) that GRAND GRACE should have used her rudder and engines to steer away from collision. The trial court found these contentions to be "quite resourceful, but the evidence on which they are based is shadowy, illusory, and in most instances non-existent. Libelant has completely failed to carry its burden of proof." (Mem. Dec., R. 74; Finding 21, R. 79).

1. *Slacking off Chain.* In the strong wind, GRAND GRACE's anchor chain was held by the windlass brake, and also secured by a stopper, consisting of a turnbuckle and shackle (Ex. 116-A; R. 1293-94). To pay out chain it would be necessary first to start the engines and come ahead with the ship so as to put slack in the chain, then release the turnbuckle and shackle (R. 1290-94). There was no time to do this. As Captain Wang testified: "There was hurry. The time is so hurry, I have no time to slacken my starboard chain because I have to loose the chain stopper, you see, first. We have standby engine. The engine takes three or four minutes, you see" (R. 1076-77).

In any event, there is no evidence whatever that slackening the anchor chain would have avoided the collision. Captain Wang testified that even if he had slackened chain it would have remained tight in the strong wind and close to the surface of the water, and OTELLO would have hit the chain and come against GRAND GRACE (R. 1077).

2. *Using Rudder to Veer Ship.* First, the rudder would have no effect in moving the GRAND GRACE without her engine also going ahead. The vessel was windrode and would lie where the wind held her, regardless of rudder position (R. 849). Second, when a vessel is at anchor in a strong wind, use of the engines thrusting water against the rudder will move the *stern,* but will have little or no effect on the *bow,* which is held by the anchor chain. OTELLO's brief (p. 15) mentions that Captain Pullen, Master of the ANTINOUS, used his rudder and engines to veer the ANTINOUS. But ANTINOUS had her engines going at the time, and he veered her *stern* (R. 1647, 1675). Captain Pullen also testified that, even using the engines against the rudder, it does not change the position of the *bow*:

> "Q. You mentioned that as the OTELLO came by you gave your ship left rudder, kicked the engine so that moved your stern northward?
>
> A. Northward, right . . .
>
> Q. But actually with the bow anchored it doesn't change the position of the bow, for example, does it?
>
> A. No, it does not." (R. 1690).

It was with GRAND GRACE's bow that OTELLO collided.

Third, as set forth above, there was no time for this. GRAND GRACE's engine room was on usual anchor watch. It would have taken at least four minutes to prepare the engines to go ahead (Testimony of Ch. Eng., R. 1033).

Fourth, even if GRAND GRACE could have swung her bow, OTELLO still would have collided with her. The actual point of collision was nearly midships on the OTELLO, 200 feet forward of her stern (Sundlof, Trial testimony, R. 186-87; Drawing Ex. 39). Therefore, even if GRAND GRACE could have swung her bow as much as 150 feet in either direction there would still have been a collision. There is no evidence whatever that, even given plenty of time and use of her engines, GRAND GRACE could have swung such a distance.

Finally, in what direction should GRAND GRACE have swung her bow, assuming she could have done so? OTELLO had been maneuvering her engines, at times ahead and at times astern, just before the collision. GRAND GRACE could not guess what OTELLO's next maneuver might be. For GRAND GRACE to have turned in either direction could well have caused greater damage.

The quotation from Knight on Seamanship (Ap. Br. p. 15) is totally inapplicable to the facts. It does not apply where a vessel is windrode so that the heading is controlled by the wind rather than the current, and it also assumes plenty of time.

Appellant's suggestion (Br. p. 6, 16) that the trial court failed to draw adverse inferences from GRAND GRACE's "failure to produce her master or pilot at the trial, or to take their de bene esse depositions" is absurd. The master of the vessel was Captain Hao Wang, whose de bene esse deposition is in the record (R. 1048-1119). There was no pilot aboard the GRAND GRACE,

and had been no pilot for two days prior to the collision (R. 1059-61). As for Sha, the Chief Mate, he was examined by appellant's proctors *ad infinitum* at three different sessions of discovery deposition, all of which is in evidence (R. 795-867; 869-891; 1219-1248).[7]

Any fair reading of the authorities cited by appellant (Br. p. 16-17) shows they are wholly inapplicable to the circumstances of the present case. For the most part, they involve situations where a helpless vessel dragged for several hours toward one that could have moved out of the way. This was not the situation of OTELLO, which was navigating with full use of her engines and rudder, and appeared to be going out to the fairway, and the danger of collision with GRAND GRACE only arose a few moments before the actual collision. As said in *Fassio* v. *The E. W. Sinclair:* "Any duty to pay out more anchor must depend upon the circumstances; i.e., whether the vessel has the time and opportunity to do so." 207 F. Supp. 700, 713. Here the trial court has expressly found GRAND GRACE not negligent.

Finally, as found by the trial court based on abundant evidence, the faults and negligence of OTELLO "were flagrant and major in character and were the proximate cause of and fully account for the collision" (R. 80). Therefore, if there were any doubts as to the conduct of the GRAND GRACE, they should be resolved in her favor. *The Victory,* 168 U.S. 410, 423 (1897); *The Oregon,* 158 U.S. 186, 197 (1895).

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[7] The second session was adjourned because of illness (R. 889-90) and appellant had full opportunity to complete the deposition at a third session (R. 1219-48).

LITIGATION EXPENSES

Appellant complains (Br. p. 28) of the allowance of $1,795.12 litigation expenses to appellee Grace Navigation Corporation.

This was fully within the discretion of the trial court. In view of the finding, "the evidence upon which libelant's contentions are based is shadowy, illusory, and in most instances non-existent," (R. 74-79) the court would have been justified in also allowing GRAND GRACE's claim for reasonable attorneys' fees and traveling expense for depositions. *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962); *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 164 (1939). But the court denied that portion of GRAND GRACE's claim. (Order., R. 85-86). It would therefore seem that GRAND GRACE, rather than OTELLO, has cause to complain on this issue.

In any event, the litigation expenses allowed were largely deposition costs which could have been claimed and allowed as ordinary taxable costs had they not been allowed as litigation expenses (See details of Claim, R. 119-21).

CLAIM FOR DAMAGES UNDER RULE 24

Appellee Grace Navigation Corporation hereby requests this Court, in its discretion, to allow damages for delay pursuant to Rule 24(2), (4) of this Court. At the outset of this appeal, appellant was notified that damages for delay would be claimed (R. 138-39).

This is an appropriate case for the award of damages for delay under Rule 24, because of the following factors:

1. The trial court's finding that appellant's contentions are based on evidence "shadowy, illusory, and for the most part non-existent" (R. 74-79).

2. The strong presumption of fault against OTELLO as the moving vessel and the strong presumption of innocence in favor of GRAND GRACE as the anchored vessel.

3. The trial court's detailed fact findings of fault on the part of OTELLO and innocence of the GRAND GRACE.

4. The rule of *McAllister* v. *United States* that, "these findings can not be set aside unless clearly erroneous."

5. The overwhelming substantial evidence in support of the trial court's detailed findings of fact.

6. Appellant's delay and failure to follow the rules of this Court in its appeal.

Although the final decree was entered July 19, 1965, the notice of appeal was not filed until September 10, 1965 (R. 156), and appellant did not file the record with this Court until December 6, 1965, and did not file its brief until April 4, 1966.

Although FRCP Rules 75(a), (d) required that appellant file its designation of record and statement of points *promptly* after the notice of appeal, appellant did not file its designation of record until November 17, 1965 (R. 156), and did not file statement of points until December 8, 1965.

Appellant has ignored Rule 18(f) of this Court requiring that appellant's brief contain an appendix setting forth table of exhibits.

It is submitted that appellant's appeal is groundless and can only be presumed to have been taken for purposes of delay.

CONCLUSION

This case is much like one where a moving automobile collides with one that is properly parked.

For the reasons set forth, the decree of the District Court in favor of the GRAND GRACE and against OTELLO should be affirmed, with damages for delay.

Respectfully submitted,

WOOD, WOOD, TATUM, MOSSER & BROOKE
ERSKINE B. WOOD
Proctors for Appellees
SS GRAND GRACE and
Grace Navigation Corporation

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
Portland, Oregon 97205

JOHN F. KILKENNY
United States District Judge

January 5, 1965

Mr. Erskine B. Wood
Attorney at Law
1310 Yeon Building
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Mr. Kenneth E. Roberts
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Gentlemen:

Re: REDERI A/B SOYA v. SS GRAND GRACE, et al, Civil No. 64-27

The findings and interlocutory decree presented by Mr. Wood are, in my view, in conformity with my recent memorandum. Both the findings and the decree have been signed as of today and a trial date fixed on the issue of damages for the week of February 22nd.

At this time, I exercise my discretion against the allowance of attorney fees to either of the claimants. Evi-

dence on reasonable expenses to be taxed as costs may be presented at the time of the hearing.

Very sincerely yours,
/s/ JOHN F. KILKENNY

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

ERSKINE B. WOOD
Of Proctors for Appellees